

**ANNUAL REPORT
OF THE
ADMINISTRATIVE RULES
OVERSIGHT COMMITTEE**



**Indiana Legislative Services Agency
200 W. Washington Street, Suite 301
Indianapolis, Indiana 46204**

November, 2004

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2004

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A copy of this report is available on the Internet. Reports, minutes, and notices are organized by committee. This report and other documents for this Committee can be accessed from the General Assembly Homepage at <http://www.state.in.us/legislative/>.

I. STATUTORY DIRECTIVE

IC 2-5-18-4 establishes the Administrative Rules Oversight Committee ("the Committee") and gives the Committee oversight over the rules of most state agencies. IC 2-5-18-8 specifies that the Committee's oversight functions include the authority to do the following:

Sec. 8. (a) The committee shall receive and may, at its discretion, review a complaint filed by a person regarding a rule or practice of an agency.

(b) The committee may review an agency rule, an agency practice, or a failure of an agency to adopt a rule.

(c) The committee may recommend that a rule be modified, repealed, or adopted.

(d) When appropriate, the committee shall prepare and arrange for the introduction of a bill to clarify the intent of the general assembly when the general assembly enacted a law or to correct the misapplication of a law by an agency.

Additionally, under IC 4-22-2-46, the Committee "shall carry out a program to review each rule adopted under this chapter [IC 4-22-2] that has a fiscal impact of more than five hundred thousand dollars (\$500,000)." Under the Committee's program of review, the Chair receives a copy of each fiscal analysis prepared by the Legislative Services Agency under IC 4-22-2-28 whenever an agency determines that a proposed rule has an "estimated economic impact greater than five hundred thousand dollars (\$500,000)." At the discretion of the Chair, the Committee may review any such rule of which the Chair is notified.

II. INTRODUCTION AND REASONS FOR STUDY

As a statutory committee to which no topics were referred by the Legislative Council during the 2004 interim, the Committee is not required to file a final report. However, over the course of its work program during the 2004 interim, the Committee made certain findings of fact and recommendations. This report is limited to the activities of the Committee that relate to those findings of fact and recommendations.

III. SUMMARY OF WORK PROGRAM

The Committee met four times following the conclusion of the 2004 session of the General Assembly. All four meetings were held at the State House in Indianapolis.

At the first meeting on August 19, 2004, the Committee heard testimony on the progress of the Family and Social Services Administration (FSSA) in implementing SEA 493 (2003), concerning home and community based services (HCBS) for elderly and disabled individuals. The Committee's findings of fact and recommendations on this

topic are summarized in this report.

On September 15, 2004, the Committee met to review the following: (1) A complaint filed concerning the Indiana Board of Accountancy's proposed rules to establish a quality review program for certified public accountant and public accountant firms (LSA#03-270). (2) Indiana State Department of Health rules concerning on-site sewage systems (LSA #02-231). (3) Water Pollution Control Board rules concerning municipal storm sewer systems (LSA#01-96; i.e., "Rule 13"). The Committee did not make any findings of fact or recommendations on these topics.

At its third meeting on October 12, 2004, the Committee considered a bill draft that would amend IC 4-22-2-28 to specify the factors an agency must consider in determining whether a proposed rule has an economic impact greater than \$500,000, such that a fiscal analysis by the Legislative Services Agency (LSA) is required. The Committee also reviewed a draft of a final report containing the Committee's findings of fact and recommendations on certain topics considered during the interim. In order to allow for additional input on the bill draft and final report, the Committee decided to schedule a fourth meeting in November.

On November 16, 2004, the Committee met to do the following: (1) Reconsider the bill draft that would specify when an agency must submit a rule to LSA for a fiscal analysis. (2) Consider a bill draft that would void the HCBS rules adopted by the Division of Disability, Aging, and Rehabilitative Services (DDARS) and require DDARS to adopt new HCBS rules to implement the policies set forth in SEA 493 (2003). (3) Receive an update on the efforts of the Indiana Department of Environmental Management (IDEM) to help communities comply with the storm water rules (Rule 13). (4) Adopt the Committee's final report after finalizing the Committee's recommendations on certain issues considered during the interim.

IV. SUMMARY OF TESTIMONY

Below is a summary of the testimony received on the two issues on which the Committee made findings of fact and recommendations during the 2004 interim.

A. FSSA's implementation of SEA 493(2003); August 19, 2004

(1) Annette Biesecker, Legislative Director for FSSA, explained that SEA 493 (2003) was meant to expand the provision of health care services to the elderly and disabled in their homes and communities, instead of in nursing facilities. Ms. Biesecker then focused her testimony on a table¹ summarizing FSSA's progress in implementing each

¹See Exhibit 2 of the meeting minutes of the August 19, 2004, meeting of the Administrative Rules Oversight Committee. Exhibits and minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana.

major section of the act. During her presentation, Ms. Biesecker noted that SEA 493 provides that the cost of providing long term care under the act, through home and community based services (HCBS), may not exceed the total amount of available state and federal funds for those services. She explained that as a result, FSSA has been limited to increasing the availability of HCBS within the current fiscal constraints of state resources.

(2) John Cardwell, Chairman of the Indiana Home Care Task Force, expressed his frustration with the status of SEA 493's implementation. Noting that other states with similar HCBS programs had been able to determine the costs of implementation, he questioned FSSA's need to hire an outside consultant to estimate the costs of implementing SEA 493. He suggested that the protracted outside fiscal analysis had delayed implementation of SEA 493. Mr. Cardwell also alleged that rules establishing standards for HCBS providers adopted by the DDARS failed to implement the policies of SEA 493.

(3) John Stallings, Executive Director of the Indiana Association for Home and Hospice Care, testified that FSSA's "rush to regulate" home health care providers had created disincentives for providers to participate in HCBS programs. He claimed that home health care providers are subject to numerous audits and surveys which result in lost hours and productivity. Mr. Stallings echoed Mr. Cardwell's dissatisfaction with the HCBS provider rules. He complained that DDARS had not sought input from HCBS providers, and that the comments submitted were not considered in the rulemaking process.

(4) Duane Etienne, President and CEO of CICOA Aging & In-Home Solutions, explained the functions of his agency in serving as central Indiana's area agency on aging. He noted that CICOA funds home health aides, attendant care, adult day care, respite services, transportation, and other services for the aged and disabled in eight counties. Mr. Etienne then focused his testimony on a table² illustrating the potential

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²See Exhibit 7 of the meeting minutes of the August 19, 2004, meeting of the Administrative Rules Oversight Committee. Exhibits and minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. The text of the minutes are also available on the Internet

savings to the state during the 2004 fiscal year if home based care, instead of nursing home care, had been provided to those nursing home residents identified as appropriate for home care in CICOA's service area. Mr. Etienne also suggested that money saved through the use of conversion waivers, which allow people to transfer from nursing homes to HCBS, should be used by FSSA to implement the requirements of SEA 493.

(5) June Lyle, Associate State Director for Public Policy for AARP Indiana, stressed the importance of SEA 493's expansion of eligibility for HCBS by increasing the income limitation for qualifying individuals. She noted that with more people eligible for HCBS, fewer would need to rely on the more expensive option of a nursing home. She argued that FSSA should not need to hire an outside consultant to determine that it will save money by expanding eligibility for HCBS. Ms. Lyle also reported that the long term care services required to be provided under the act, including adult foster care, assisted living, and adult day care, were still either underutilized or unavailable throughout much of Indiana. Noting that SEA 493 required the Office of Medicaid Policy and Planning (OMPP) to implement a policy allowing Medicaid funding to follow an individual who transfers from institutional care to HCBS, Ms. Lyle reported that the state's area agencies on aging were not receiving full funding to move people to HCBS. Expressing her concerns about the HCBS provider rules adopted by DDARS, Ms. Lyle recommended that the Committee ask DDARS to withdraw the rules.

(6) Paul Severance, Executive Director of United Senior Action of Indiana, expressed frustration that FSSA had not yet changed the income eligibility standard for the HCBS program. He complained that the only action FSSA had taken had been to commission a study of the fiscal impact of changing the eligibility standard. Mr. Severance also criticized FSSA for not making efforts to identify nursing home residents who could receive care in another setting. He explained that other states routinely send trained social service workers to nursing homes to explain alternative care options to residents and to provide them with assistance in making a move.

B. Administrative rules requiring fiscal review under IC 4-22-2-28; October 12, 2004; November 16, 2004

At the Committee's meeting on October 12, 2004, Senator Young presented PD 3538, a bill draft that would amend the statute (IC 4-22-2-28) that requires an agency to submit a rule with an estimated economic impact greater than \$500,000 to the Legislative Services Agency (LSA) for a fiscal review. He noted that the Committee's consideration of several rules during the interim had revealed that agencies have not applied consistent standards in determining whether a fiscal review is required under IC

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4-22-2-28. Accordingly, he offered PD 3538 to clarify the legislature's intent in enacting the statute. As presented, the bill would require an agency and LSA to consider the following: (1) Any incidental costs of compliance for regulated entities, in addition to direct costs imposed under the rule. (2) The rule's impact on an entity that already voluntarily complies with the rule. The bill would also clarify that the agency and LSA must consider the rule's annual economic impact after the rule is fully implemented following any phase-in period.

After input from Diane Powers, Director of the Office of Fiscal and Management Analysis for LSA, the Committee agreed to further study the draft and make any necessary changes.

At the Committee's meeting on November 16, 2004, Senator Young presented PD 3827, a revised version of the bill draft the Committee had considered at its meeting on October 12, 2004. Senator Young explained that the revised bill would require an agency to take into account a proposed rule's impact on entities that already voluntarily comply with the rule. He reminded the Committee that LSA had expressed concern that agencies often submit a proposed rule for review shortly before the public hearing on the rule. As a result, LSA cannot prepare a fiscal impact statement in time to make it available for the hearing. Instead of altering the 45-day period that LSA has to prepare its statement, Senator Young revised the draft to require an agency to submit the rule to LSA not later than 50 days before the public hearing on the rule. He noted that the change would ensure that LSA's fiscal impact statement is available at least five days before the public hearing, even if LSA takes the entire 45 days it is allowed to complete its review.

After further discussion by the Committee, PD 3827 was approved by the Committee for introduction during the 2005 session of the General Assembly.

V. COMMITTEE FINDINGS AND RECOMMENDATIONS

The Committee made the following findings of fact and recommendations:

(1) Agencies have not applied consistent standards in determining whether a fiscal analysis is required under IC 4-22-2-28 (the administrative rulemaking statute requiring an agency to submit a rule with an estimated economic impact greater than \$500,000 to the Legislative Services Agency (LSA) for a fiscal analysis). The Committee therefore recommends the introduction of a bill (PD 3827) during the 2005 session of the General Assembly to specify the factors an agency must consider in determining whether a proposed rule has an economic impact greater than \$500,000. The proposed bill specifies that the agency must consider: (1) the rule's annual economic impact on all regulated entities after the rule is fully implemented; and (2) the rule's impact on an entity that already voluntarily complies with the rule. The bill further specifies that an agency must submit to LSA a rule requiring a fiscal impact statement not later than 50 days before the public hearing on the rule. Conforming changes are made to the

statute requiring the education roundtable to determine the fiscal impact of certain recommendations it makes.

(2) Consumers, area agencies on aging, and service providers have been frustrated with a perceived lack of progress by FSSA in implementing SEA 493 (2003), concerning home and community based services (HCBS). In particular, these interested parties have expressed concerns that the HCBS provider standards rules adopted by the Division of Disability, Aging, and Rehabilitative Services (DDARS) do not implement the policies of SEA 493 (2003). The Committee therefore recommends the introduction of a bill (PD 3829) during the 2005 session of the General Assembly to void the HCBS rules adopted by DDARS and to require DDARS to adopt new rules not later than January 1, 2006. The new rules must: (1) protect consumers of HCBS; (2) treat different populations of consumers in a manner appropriate to their particular needs; (3) not impose barriers to HCBS by imposing costly or burdensome administrative requirements on providers; and (4) otherwise comply with Indiana's long term care statutes. The bill additionally requires DDARS to: (1) consult with certain interested parties during the rulemaking process; and (2) publish in the Indiana Register the agency's written response to any comments received from the interested parties during the rulemaking process.

W I T N E S S L I S T R E L A T E D T O R E C O M M E N D A T I O N S

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Family and Social Services Administration

John Cardwell
Chairman
Indiana Home Care Task Force

Duane Etienne
President and CEO
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June Lyle
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